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426-561—71——1

1 RELEVANT DOCKET ENTRIES IN THE PROCEEDING BELOW

CAUSE NO. CR68–0661

STATE OF INDIANA
vs.
THEON JACKSON

Comes now Noble R. Pearcy, Prosecuting Attorney, May 6, 1968, and files with the clerk of said Court, AFFIDAVIT FOR ROBBERY which Affidavit, reads in the words and figures as following:

In the Criminal Court of Marion County, 1968 Term
STATE OF INDIANA,
Marion County, ss:

THE STATE OF INDIANA
vs.
THEON JACKSON
Affidavit for ROBBERY

BE IT REMEMBERED, That on this day before me, NOBLE R. PEARCY Prosecuting Attorney of the Nineteenth Judicial Circuit, personally came HARRY C. DUNN who, being duly sworn, upon his oath says that THEON JACKSON on or about the 28th day of JULY, A.D. 1967, at and in the County of Marion in the State of Indiana did then and there unlawfully, feloniously, forcibly by violence and putting MILDRED FARLEY in fear, take from the person and possession of the said MILDRED FARLEY, a purse and its contents of the value of FOUR DOLLARS ($4.00), which property the said MILDRED FARLEY then and there lawfully held in her possession and was then and there the property of MILDRED FARLEY, then and there being contrary to the

form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

2 /s/ HARRY C. DUNN.

Subscribed and sworn to before me, this 6th day of MAY, A.D. 1968.

/s/ NOBLE R. PEARCY,
Prosecuting Attorney, Nineteenth Judicial Circuit.

/s/ DAVID A. JESTER,
Deputy Prosecuting Attorney, Nineteenth Judicial Circuit.

And afterwards towit: Wednesday May 15, 1968, of said Court, before the Honorable John T. Davis, Judge Presiding, the following further proceedings were had herein towit:

Comes now the State by State by J. Huschman, deputy prosecutor defendant in person and by counsel Wm. Laswell, Defendant in person waives arraignment and pleads not guilty.

CR68–0661 THEON JACKSON ROBBERY

WILLIAM LASWELL.

(All Entries Hereafter Are Identical in Both Cause No. CR68–0661 and CR68–0663.)

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3 Cause No. CR68–0663

STATE OF INDIANA
vs.
THEON JACKSON

Comes now Noble R. Pearcy, Prosecuting Attorney, May 5, 1968 and files with the clerk of said court, AFFIDAVIT FOR ROBBERY which Affidavit, reads in the words and figures as following:

In the Criminal Court of Marion County 1968 Term

STATE OF INDIANA,
Marion County, ss:

THE STATE OF INDIANA
vs.
THEON JACKSON

Affidavit for ROBBERY

BE IT REMEMBERED, That, on this day before me, NOBLE R. PEARCY Prosecuting Attorney of the Nineteenth Judicial Cir-

cuit, personally came HARRY DUNN who, being duly sworn, upon his oath says that THEON JACKSON on or about the 22nd day of JULY, A.D. 1967, at and in the County of Marion in the State of Indiana, did then and there unlawfully, feloniously, forcibly by violence and putting FLORENCE LYONS in fear, take from the person and possession of the said FLORENCE LYONS, Money, then and there of the value of FIVE DOLLARS ($5.00), which property the said FLORENCE LYONS then and there lawfully held in her possession, and which said money was there the property of FLORENCE LYONS, then and there being contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

4 /s/ HARRY C. DUNN.

Subscribed and sworn to before me, this 6th day of MAY, A.D. 1968.

/s/ NOBLE R. PEARCY,
Prosecuting Attorney, Nineteenth Judicial Circuit.

And afterwards towit Wednesday May 15, 1968, of said Court, before the Honorable John T. Davis, Judge Presiding, the following further proceedings were had herein towit:

Comes now the State by J. *Juschman*, deputy prosecutor, defendant in person and by counsel Wm. T. Laswell. Defendant in person waives arraignment and pleads not guilty.

CR68–0663 THEON JACKSON ROBBERY
WILLIAM LASWELL.

(All Entries Hereafter Are Identical in Both Cause No. CR68–0661 and CR68–0663.)

An afterwards towit Friday September 13, 1968 being the September Term, 1968, of said Court, before the Honorable John T. Davis Judge thereof, the following further proceedings were had herein towit:

Defendant by counsel Philip Melangton files Motion for Appointment of an Interpretor:

Which reads as follows:

In the Marion Criminal Court, Division I, Cause Nos. CR68–0661, CR68–0663

STATE OF INDIANA,
County of Marion, ss:

5 STATE OF INDIANA
vs.
THEON JACKSON

MOTION FOR APPOINTMENT OF AN INTERPRETER

Comes now Philip R. Melangton, Jr., attorney for the defendant in the above captioned causes, and moves that this Court appoint an interpreter without cost to the defendant, and in support of said motion states as follows:

1. That he has recently been appointed public defender for this defendant in each of the above captioned cases although said cases have been on file since May 6, 1968.

2. That counsel has examined a transcript of evidence on a hearing held in this court on May 15, 1968, and it is apparent to counsel that the defendant is a deaf mute with very little education and is unable to understand, read or speak the English language.

3. Counsel has conferred with Sergeant Brenton of the Indianapolis Police Department who is familiar with the sign language used in deaf mute communication and has been advised by Sergeant Brenton of the latter's inability to communicate with the defendant because of the defendant's lack of education and knowledge of the standard sign language.

4. That counsel has also communicated with Rev. Myron Prok who testified in this cause at said hearing on May 15, 1968, and has been informed that Rev. Prok has had difficulty communicating with defendant because of defendant's lack of understanding of the sign language.

6 5. It has come to the attention of counsel that there are those employed by the State of Indiana at the State School for the Deaf in Indianapolis, Indiana, who are engaged in education and instruction of deaf mutes although counsel is unaware of the identity of these persons.

6. That defendant is without funds with which to employ either his own private counsel or an interpreter, and therefore, it is encumbent on the State of Indaina to provide such interpreter.

It is, therefore, requested that this Court enter an order requiring the State of Indiana, through the office of the prosecuting attorney for the 19th Judicial Circuit, to make inquiry and determine the existence of someone employed by the State of Indiana at the State School for the Deaf at Indianapolis,

Indiana, who can act as an interpreter in this case in order that the defendant be able to understand the nature of the charges and assist his attorney in his defense and that after such person is located, that this Court appoint such person as such interpreter.

/s/ Philip R. Melangton, Jr.
PHILIP R. MELANGTON, JR.,
Attorney for Defendant,
933 Indiana Building, Indianapolis, Indiana 46204.

and request that causes be set on Jury Docket; Which reads as follows:

7 In the Marion Criminal Court, Division I, Cause Nos. CR68–0661, CR68–0663

STATE OF INDIANA,
County of Marion, ss:

STATE OF INDIANA
vs.
THEON JACKSON

REQUEST THAT CAUSES BE SET ON JURY DOCKET

Comes now Philip R. Melangton, Jr., attorney for the defendant in the above captioned causes and states that the defendant is a deaf mute and is incapable of speaking or understanding the English language and has had very little education. That by reason thereof, the defendant cannot independently waive his Constitutional right to trial by jury and counsel would be derelict in his duty to execute such waiver in his behalf. Counsel has been unable to communicate with the defendant with respect to the question of jury waiver and has been unable to ascertain by contact with others who have been in communication with defendant whether or not the defendant understands right to trial by jury and the possibility of waiver thereof.

WHEREFORE, it is requested that the above captioned causes both be placed on jury docket for early trial.

/s/ Philip R. Melangton, Jr.
PHILIP R. MELANGTON, JR.,
Attorney for Defendant,
933 Indiana Building, Indianapolis, Indiana 46204.

And afterwards towit Wednesday October 23, 1968 being the October Term, 1968, before the Honorable John T. Davis

Judge thereof, the following further proceedings were had herein towit:

8 Defendant by counsel requests continuance: granted. Court being duly advised that defendant might lack Comprehension Sufficient to Understand the Nature of Charges against him and to Aid his counsel in his own defense. Court now appoints Dr. Nie and Dr. Schuster to examine the defendant as to same.

* * * * *

And afterwards towit Tuesday November 12, 1968, of said Court, before the Honorable John T. Davis, Judge Presiding, the following further proceedings were had herein towit:

Drs. L. Nie and D. Schuster files their Joint report, which reads as follows:

Hon. JUDGE JOHN DAVIS,
Criminal Court I,
City County Building,
Indianapolis, Ind.

NOVEMBER 8, 1968.

DEAR JUDGE DAVIS: At your request and with the help of Mr. John Olsen from the deaf school we examined Mr. Theon Jackson age 27 in the Detention Ward of Marion County General Hospital. Our examinations and observations were the result of a joint examination and observation period with Mr. Olsen helping in the communication with sign language since Mr. Jackson does not hear and does not communicate except through sign language and some pantomime. Our examination was based on our observations of Mr. Jackson and on information given us by Mr. Olsen who had spent some hours with Mr. Jackson trying to learn of his capacities.

He has denied flatly any responsibility for the acts which he was charged, but he has only limited capacity for ap-

9 preciating or understanding such charges. On the basis of our observations we believe he has a moderately severe intellectual defect in addition to his communicating difficulties. In making change and handling simple mathematical problems Mr. Jackson shows marked limitations in ability. He apparently can write and recognize his own name but no more.

On the basis of our observation of Mr. Jackson it is our opinion that he is mentally defective and coupled with his severe hearing loss and communication loss that he can neither under-

stand the nature of the charge against him nor can he adequately participate in preparing his own defense.

Very truly yours,

/s/ Louis W. Nie, M.D.
LOUIS W. NIE, M.D.

/s/ Dwight Schuster, M.D.
DWIGHT SCHUSTER, M.D.

* * * * *

And afterwards towit Wednesday December 18, 1968, of said Court, before the Honorable John T. Davis, Judge Presiding, the following further proceedings were had herein towit:

State by John Hirschman, deputy Prosecutor; defendant in person and by counsel Philip Melangton. Submitted to Court for Mental hearing.

Witnesses sworn. Hearing had. Defendant submits evidence and rests.

Court takes this matter under advisement. Set for finding December 26, 1968, at 2:00 P.M.

10 And afterwards towit Thursday December 26, 1968 being the December Term, 1968, of said Court, before the Honorable John T. Davis Judge thereof, the following further proceedings were had herein towit:

Come now the State of Indiana by John Hirschman, deputy prosecutor; defendant Theon Jackson in person and by counsel Philip Melangton. Court having heard said evidence, now finds defendant lacks comprehension sufficient to make his defense.

Court now orders the defendant Theon Jackson committed to the Indiana Division of Mental Health to be confined until such time the Division of Mental Health shall certify to *his* Court that the defendant is sane.

The Sheriff of Marion County is directed to execute the order of this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the defendant Theon Jackson be and hereby is, committed to the Indiana Division Mental Health to be confined until such time that the Division of Mental Health shall certify to this Court that the defendant is sane.

The Sheriff of Marion County is directed to execute the order of this Court.

And afterwards towit Wednesday January 21, 1969, of said Court before the Honorable John T. Davis, Judge Presiding, the following further proceedings were had herein towit:

Attorney Philip Melangton for defendant files Motion for New Trial, which reads as follows:

11 In the Marion Criminal Court, Division I, Cause Nos. CR68–0561, CR68–0663

STATE OF INDIANA,
County of Marion, ss:

THE STATE OF INDIANA
v.
THEON JACKSON

MOTION FOR NEW TRIAL

Comes now the defendant Theon Jackson and moves for a new trial on each of the above captioned cases for the reason that the decision of the Court is not sustained by sufficient evidence and is contrary to law.

/s/ Philip R. Melangton, Jr.
PHILIP R. MELANGTON, Jr.,
Attorney for Defendant.

MEMORANDUM

On December 26, 1968, the Court held in each of the above captioned cases that the defendant has not comprehension sufficient to understand the proceedings and make his defense. The Court then ordered the defendant committed to the Department of Mental Health to be confined by the Department in an appropriate psychiatric institution.

The evidence in the case upon which the Court based its decision consisted in part upon the testimony of Doctors Louis W. Nie and Dwight Schuster, each of whom are practicing psychiatrists. The doctors testified that the defendant due to a severe hearing and communication loss could not understand the nature of the charges or assist in his own defense. The doctors also testified that it was doubtful whether the defendant would ever be able to communicate due to a lack of

12 comprehension. There was no evidence that the defendant was insane.

Burns 9–1706a provides that when at any time before the trial of any criminal cause the Court has reasonable ground for

elieving the defendant to be insane he shall fix a time for earing and appoint two physicians to examine the defendant. f the Court finds that the defendant has not comprehension ufficient to understand the proceedings and make his defense, he trial shall be delayed or continued on the ground of the lleged insanity of the defendant. It is also provided that the Court upon a finding that the defendant has not comprehension sufficient to understand the proceedings and make his efense shall order the defendant committed to the Department of Mental Health to be confined by the Department in n appropriate psychiatric institution. The statute further provides that whenever the defendant shall *become sane* the Court hall be advised and an order shall be entered directing the return of the defendant or the Court may enter such order whenver he shall be sufficiently advised of the defendant's *restoration to sanity.*

The statute apparently equates lack of comprehension and sanity inasmuch as the lack of comprehension causes the efendant's confinement and becoming sane or being restored o sanity terminates his confinement and permits him to stand rial. Inasmuch as the evidence here is that the defendant is ot insane and his sanity cannot be restored, there is no provision for the release of the defendant from confinement by he Department of Mental Health at any time. The defendant ust, therefore be considered to have been committed to the epartment of Mental Health for confinement in a psychiatric stitution for the rest of his life. The defendant has not been convicted of any crime.

The Sixth Amendment of the Constitution of the United States as well as Article I, Section 13, of the onstitution of the State of Indiana provide that a defendant ust be confronted by witnesses and has a right to be informed the nature and cause of the accusation. One, such as the efendant, cannot be brought to trial in the face of these Constitutional guarantees.

To confine this defendant in a psychiatric institution for the st of his life constitutes a deprivation of other Constitutional feguards afforded by the Constitution of the United States well as the Constitution of the State of Indiana. To be confined for life violates the Eighth Amendment of the United ates Constitution as well as Article I, Section 16, of the Constitution of the State of Indiana prohibiting cruel and unusual

punishment. Excessiveness as well as the mode of punishment may be unconstitutionally cruel in both State and Federal courts. *Weems v. United States* (1910) 217 U.S. 349. The defendant is being punished for being sick. *Powell v. Texas* (1968) 392 U.S. 514. *Robinson v. California* (1962) 370 U.S. 660.

The Thirteenth Amendment to the Constitution of the United States prohibits involuntary servitude except as a punishment for crime whereof the parties shall have been duly convicted. Such is also contained in Article I, Section 37, of the Constitution of the State of Indiana. The defendant has not been convicted of any crime and his confinement is in violation of these rights.

Defendant's confinement is also in violation of the due process clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States.

14 The action of this Court in confining the defendant pursuant to Burns, Indiana Statutes 9–1706a is, therefore, unconstitutional and a new trial should be granted.

Respectfully submitted,

/s/ Philip R. Melangton, Jr.
PHILIP R. MELANGTON, Jr.,
Attorney for Defendant,
933 Indiana Building, Indianapolis, Indiana 46204.

And afterwards towit Monday May 12, 1969, of said Court, before the Honorable John T. Davis Judge Presiding, the following further proceedings were had herein towit:

* * * * *

Court . . . files Entry Nunc Pro Tunc, which reads as follows:

In the Criminal Court of Marion County, Division I, Cause Nos. CR68–0661, CR68–0663

STATE OF INDIANA,
County of Marion, ss:

STATE OF INDIANA
vs.
THEON JACKSON

ENTRY NUNC PRO TUNC

It now appearing to the Court that there is a discrepancy in the records of the above causes, in that the Docket Book record

of both causes shows that the motion for new trial heretofore filed by the Defendant was overruled by this Court and the presiding judge thereof on February 10, 1969, whereas the entry prepared for and entered in the order book shows that the said motion was overruled on February 7; 1969, the Court now herein orders and directs that the order book entry be corrected to show that said motion for new trial filed in both of said causes was overruled by this Court on February 10, 1969.

EXCERPTS FROM BILL OF EXCEPTIONS (REPORTER'S TRANSCRIPT OF THE PROCEEDINGS)

DWIGHT SCHUSTER, a witness called by the Court, first having been duly sworn by the Court, testified as follows, to-wit:

* * * * *

(R., p. 53, l. 8 to p. 55, l. 3)

Q. And what opinions, if any did you form as a result of your examination?

A. It is my opinion that Mr. Jackson is mentally defective, has severe hearing loss and communication loss so that he can neither understand the nature of the charges against him nor can he adequately participate in preparing his own defense.

Q. Could you explain to me a little bit about this mental defect?

A. In the process of trying to communicate with him through Mr. Olson, through sign languages, through drawings, through printed matter, through gestures, for example trying to see if he could make change, actually handling money, it seemed evident that his basic intelligence was very limited, that he had only the rudiments of intellectual abilities. I did feel that he was able to perhaps understand a little bit about what we were talking but not sufficiently that he was able to give any response which was of significance or which would enable us to have any awareness of what had happened, as to why he was in custody.

Q. Doctor, I take it from your testimony, that in your opinion that this defendant is what is known as a deaf mute, is that correct?

A. Yes, sir.

Q. And did you form any opinion as to whether he can read and write?

A. It was our opinion that the most he probably could do would be to perhaps write his name and to recognize his own name but nothing else. We couldn't get him to read anything nor to write anything.

Q. And he also appeared not to understand the deaf mute signs, is that correct?

A. Very limited number of the signs.

Q. Doctor, as a result of your examination, did you form an opinion as to whether or not the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense?

A. In my opinion he does not have sufficient comprehension to understand the nature of the charges or to make his defense.

Q. As far as a cure for that condition is concerned, a cure would consist of his learning the deaf mute sign language if he is capable of so doing, is that correct?

A. Yes, I question how much ability he has, how much more he can learn, therefore the prognosis appears rather dim.

17 * * * * *

CROSS EXAMINATION

By MR. HIRSCHMAN, Deputy Prosecuting Attorney:

(R., p. 55, l. 11 to p. 56, l. 7)

Q. Doctor, did you satisfy yourself that you really got through to the man inside so as to determine whether that person within the physical framework understood what you were trying to derive from him or was this a matter of just your being unable through Mr. Olson to get to that person inside this physical framework?

A. It was pretty much impossible to get through to him. There were a few remote things that he seemed to grasp what we were asking about but as far as feeling that we ever got through to him as to why we were there and what we were interested in, no, I don't think we ever did.

Q. Then, in other words, your opinion and your analysis and your conclusion were based on the total, the sum total of your interview and examination, in other words, re-determined, did it not, the inability to have an exchange of communication with this individual?

A. Yes, communication is a basic thing. I might add that another factor that entered into it was Mr. Olson's statement that he had spent much time with this man in attempting to develop this communication and was unable to.

* * * * *

CROSS EXAMINATION

By MR. MELANGTON, Attorney for Defendant:

18 (R., p. 57, l. 27 to p. 58, l. 13)

Q. Doctor, realizing that the word sane and insane, sanity and insanity aren't really words used in the field of Psychiatry, you do understand what the law contemplates in using those words?

A. Yes, sir.

Q. Do you feel that he is insane?

A. In strict sense, legal sense, as I understand it being insane and unable to comprehend the nature of the charges and to assist his attorney in his defense, I would say insane, yes.

Q. All right, would you say that his sanity could be restored after commitment to the State Department of Mental Health?

A. I doubt it, I don't believe so.

* * * * *

REDIRECT EXAMINATION

By THE COURT:

(R., p. 58, l. 21 to p. 59, l. 2)

Q. Doctor, just on one point here, getting back to this mental defect, would that be what is sometimes referred to in the law as feeblemindedness?

A. Yes, mental retardation.

Q. Were you able to form any conclusions perhaps as to mental aid?

A. I didn't think in terms of mental aid, actually thinking of it right now, you could almost say that this would be pre-school level.

* * * * *

19 LOUIS W. NIE, a witness called by the Court, first having been duly sworn by the Court, testified as follows, to-wit:

* * * * *

(R., p. 61, l. 18 to p. 62, l. 17)

Q. And as a result of that examination, Doctor, what opinion, if any, did you form?

A. Well, first of all, it was obvious that Mr. Jackson was deaf and that he could not communicate in the usual way. We

satisfied ourselves that he could write his name with some difficulty, probably nothing more. His capacity for, we were satisfied that he was not literate in any sense of the word, that he could not communicate by written form nor could he read. Some of the efforts to communicate with him, we asked him to draw some figures and his human figures were such as we call stick figures, they are line figures; they are rather simple in production, they are the sort of things that children do. The handling of change and making change revealed pretty definite and pretty severe limitations in this area, and then with Mr. Olson's experience I felt we were unquestionably dealing with a man who presented a moderately severe mental deficiency, coupled with the communication defect.

Q. Doctor, did you form an opinion as to whether or not this defendant had comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense?

A. My opinion is that he does not have that kind of comprehension.

* * * * *

20 (R., p. 63, ll. 1–8)

Q. I see. In other words, if I understand you correctly then, you think that even if this man were not a deaf mute, that he would still lack the necessary comprehension?

A. That is my impression, yes, sir.

Q. And I take it also from that that the problem is he is deaf?

A. Yes, sir.

CROSS EXAMINATION

By Mr. Hirschman, Deputy Prosecuting Attorney:

(R., p. 63, ll. 15–19)

Q. Doctor, in your opinion, does this defendant have an understanding so as to differentiate between right and wrong?

A. I think he probably knows in a general way the basic differences between right and wrong, yes.

* * * * *

Emma Jackson, called as a witness on behalf of the defendant, first having been duly sworn by the Court.

DIRECT EXAMINATION

By MR. MELANGTON, Attorney for Defendant:

(R., p. 65, l. 14 to p. 66, l. 20)

Q. Would you tell the Judge your name, please?
A. Emma Jackson.
Q. Are you Theon Jackson's mother?
21 A. Sure is.
Q. How old is Theon?
A. Twenty-seven (27).
Q. And where was he born?
A. Greenwood, Mississippi.
Q. Did Theon ever go to school?
A. No, never did, he been sick all his days, I would just say all his days.
Q. Was he born deaf?
A. Sure was.
Q. When did you find out he couldn't talk?
A. Oh he was something like a year old, a little better than a year old.
Q. He has never talked?
A. No.
Q. What kind of jobs has he done?
A. Well, he worked at, since he has been here, he worked at the Holiday Inn.
Q. What doing?
A. In the kitchen, helping in the kitchen is all I can tell you, and he worked in Mississippi with the building construction and that's all. He has never been to school.

* * * * *

Q. Can he write?
A. He can sort of print his name, he can't write too good. He learned that since he has been here going to school.

22 CROSS EXAMINATION

By MR. HIRSCHMAN, Deputy Prosecuting Attorney:

(R., p. 67, l. 4 to p. 69, l. 13)

Q. Mrs. Jackson, how long has Theon worn glasses?
A. About four years, I guess.

Q. And what is the nature of his eye condition, if you know?

A. Yes, Doctor, what's that doctor's name, said he had something like a—he's blind in one eye, I'll tell you that.

Q. He is?

A. Uh huh, he can't see out of one.

Q. Not at all?

A. Not at all, the other one he has something like, he called a name but it something like a cataract but it wasn't no cataract on it, but it is something like that.

* * * * *

Q. And you took him to an eye doctor?

A. No, the Deaf and Dumb School sent him.

Q. The Deaf and Dumb School here?

A. Yes, they sent him.

Q. How long did he go to the Deaf and Dumb School?

A. Well, Mrs. Johnson taught him. He went to Mrs. Johnson about, oh I think she has been teaching him a little over three years now.

23 Q. Out at the Deaf and Dumb School?

A. Well she comes to the house each time, she has come to my house and then I take him over to her house.

* * * * *

Q. How long did she teach him?

A. Oh, about three years, I guess.

Q. And when was the last time that she taught Theon?

A. Right here in May.

* * * * *

Q. And how come you stopped?

A. When he come down here, they locked him up and she couldn't teach him.

Q. In May?

A. Yes, that's right she was teaching him.

* * * * *

JOHN OLSON, a witness called on behalf of the Defendant, first having been duly sworn by the Court

DIRECT EXAMINATION

By MR. MELANGTON, Attorney for Defendant:

(R., p. 70, l. 1 to p. 74, l. 3)

Q. Would you state your name for the record, please, sir?

A. John Olson.

Q. And what is your occupation?

24 A. I am the supervising teacher of the High School Department of the School for the Deaf.

* * * * *

Q. Now, sir, have you had occasion to be with Theon Jackson here?

A. Yes, I met with him on four occasions about an hour and a half or two hours each time.

Q. Each of those four was with me?

A. Yes.

Q. And then one with the Psychiatrist?

A. That's correct. Five times.

Q. Would you explain to the Court what you have concluded, if anything, with respect to Mr. Jackson and his ability to understand the nature of these charges and to communicate with his attorney or interpreter and to assist in his own defense?

A. There is a nebulous understanding of the nature of the charges. As far as being able to prepare or contribute with the defense, nothing. The man has no concept of time which is one of the most severe factors; he has no concept of any why, when; he has a limited understanding of the concept of who.

Q. Would he even know what day this was or what month?

A. No.

Q. Or what year?

A. No.

* * * * *

25 Q. And did you reach a conclusion as to whether there was any faking?

A. Well, after ten hours as far as his inability, that everything has been said about his inability to communicate is absolutely correct. He is not faking, in fact I am not sure he is even capable of faking, that's an opinion.

Q. Have you tried to trick him or anything?

A. He is easily tricked.

Q. I mean tricked to reveal faking is what I was driving at?

A. Yes. The only way you can do it is on the most objective thing from the basis of things he knows. We did it with likes of food, this sort of thing, the very base things. We tried getting him in admitting some concepts of time like simple things of yesterday and tomorrow. He has no conception of them whatsoever. We tried to get him into revealing some dis-

honesty in his misunderstanding of simple things like money. I found no attempts of deceiving anything.

Q. What have you found with respect to his understanding of the difference between right and wrong?

A. On very gross things and that is the only way you can question him, no abstractions, of course, at all. He does know when something is right or wrong, such things as—well, we pantomined. We went through such things as beating some one up, taking their money. Yes, I think he knows these things are right or wrong.

Q. Were you present when a demonstration was done with Mrs. Price with respect to her purse?

26 A. Oh, yes, yes.

Q. Did you observe his reaction?

A. Oh, his reaction, we immediately charged him with a pantomine crime in a very objective form, a sign language you did it type thing and he shook his head vehemently.

Q. All right now, sir, the law provides that a person can have an interpreter, you between the defendant and me in other words, and between the defendant and the witnesses and the prosecutor in a Court. Would you be able to interpret so that Mr. Jackson through you could understand testimony at trial?

A. No, no.

Q. Could you interpret so that Mr. Jackson through you could understand what I was saying?

A. No.

Q. Or what the Prosecutor was saying?

A. No, I could not.

Q. Or what the Judge said?

A. No, I could not.

* * * * *

(R., p. 75, l. 24 to p. 76, l. 18)

Q. As an educator, sir, of the deaf, can you evaluate his level of mental comprehension?

A. On the level of his mental comprehension, some social interest—oh, let's just leave it at a level of comprehension, it is about a three or four year old deaf child.

27 * * * * *

Q. Do you know whether or not the Indiana State Department of Mental Health has any facilities which could,

after a length of time, aid Theon Jackson to understand the nature of these charges and assist in the defense?

A. To the best of my knowledge and the knowledge of the men in vocational rehabilitation with whom I work all the time, there isn't anything in the State of that nature.

* * * * *

(R., p. 77, ll. 19 to 23)

Q. And you do not feel that you could act as an interpreter so he could understand you?

A. No. I could not act as an interpreter for this man at the trial, no, I could not and I know of no one else who could.

* * * * *

STATEMENTS OF PRESIDING JUDGE, IN OPEN COURT, AT TIME OF FINDING AND ORDER OF COMMITMENT

(R., p. 86, l. 3 to p. 87, l. 7)

The COURT: You don't suggest that there is some other provision I could proceed under?

Mr. MELANGTON: I haven't been able to come up with any, Your Honor. It may be a problem for a higher Court to determine that is why I am making this record.

The COURT: This would constitute final judgment but would be appealable.

Mr. MELANGTON: Yes, Your Honor, I am aware of that.

28 The COURT: I suggest then that you do file a Motion for a new trial. At this time I find that the defendant does not have comprehension to understand the nature of the criminal action against him and the proceedings thereon and to make his defense. In accordance with Section 9–1706a I, therefore, commit the defendant to the Indiana Department of Mental Health to be confined by the Department in a appropriate phychiatric institution until such time as he shall be certified competent to stand trial. All right, that is all.

29 OPINION OF THE SUPREME COURT OF INDIANA. FEBRUARY 19, 1970

IN THE SUPREME COURT OF INDIANA

Appeal from the Marion Criminal Court, Division I, Nos. 569 S 110, 569 S 111

THEON JACKSON, APPELLANT

vs.

STATE OF INDIANA, APPELLEE

Hon. JOHN T. DAVIS, *Judge.*

ARTERBURN, J. Appellant was charged by affidavits with two counts of robbery. There was no trial on either charge of robbery. The only issue considered by the trial court was the mental capacity of the appellant to stand trial. A hearing on the issue resulted in the following order by the trial court:

30 IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the defendant Theon Jackson be and hereby is committed to the Indiana Division of Mental Health to be confined until such time that the Division of Mental Health shall certify to this Court that the defendant is sane.

The evidence at the hearing, which was conducted to determine appellant's capacity to stand trial, consisted mostly of the testimony of two psychiatrists the trial court had appointed to examine the appellant. Their examination revealed that appellant was a deaf-mute with a moderately severe intellectual defect. Both psychiatrists were of the opinion that appellant could neither understand the nature of the charges against him nor adequately participate in preparing his own defense. Appellant was found to be illiterate, which, when combined with his deaf-mute condition, presented a major communication gap. Appellant's mental retardation, or feeblemindedness, as one of the experts termed it, was such that his ability to learn sign language, or to learn to read or write, or both, was doubtful. Further testimony revealed that if appellant were to gain sufficient

comprehension to stand trial it would be only as a result of developing a means of communication. But even then there was some doubt expressed as to whether appellant would be able to comprehend the charges.

The trial court, in ordering appellant's examination and confinement, acted pursuant to Burns' Ind. Stat. Ann. § 9-1706a (1969 Cum. Supp.) which reads as follows:

> Commitment before trial—Subsequent actions.—When at any time before the trial of any criminal cause or during the progress thereof and before the final submission of the cause to the court or jury trying the same, the court, either from his own knowledge or upon the suggestion of any person, has reasonable ground for believing the defendant to be insane, he shall immediately fix a time for a hearing to determine the question of the defendant's sanity and shall appoint two (2) competent disinterested physicians who shall examine the defendant upon the question of his sanity and testify concerning the same at the hearing. At the hearing, other evidence may be introduced to prove the defendant's sanity or insanity. If the court shall find that the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense, the trial shall not be de-
> 31 delayed or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the trial shall be delayed or continued on the ground of the alleged insanity of the defendant. *If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the court shall order the defendant committed to the department of mental health, to be confined by the department in an appropriate psychiatric institution.* Whenever the defendant shall become sane the superintendent of the state psychiatric hospital shall certify the fact to the proper court, who shall enter an order on his record directing the sheriff to return the defendant, or the court may enter such order in the first instance whenever he shall be sufficiently advised of the defendant's restoration to sanity. Upon the return to court of any defendant so committed he or she shall then be placed upon

trial for the criminal offense the same as if no delay or postponement had occurred by reason of defendant's insanity. [Acts 1951, ch. 238, § 2, p. 682, 1961, ch. 151, § 2, p. 329; 1963, ch. 91, § 1, p. 58; 1967, ch. 291, § 2, p. 946.] (Emphasis added.)

It is appellant's contention that the above quoted statute is inapplicable; that he was denied due process of law; that in view of the unlikelihood of his improvement, he was in effect given a "life sentence." Appellant further urges that his commitment should properly be to an institute for the feebleminded and not to an institute for the insane. In this regard appellant would have the appellee first dismiss all charges against the appellant and then make application for appellant's commitment to an institution for the feebleminded. Appellant makes specific reference to Muscatatuck State Hospital and Training Center which was established to provide care for the feebleminded. Burns' Ind. Stat. Ann. § 22–1801 et seq. It appears to us that appellant has failed to understand the statutory mechanisms set up by the legislature as they refer to the Department of Mental Health.

Burns' § 9–1706a, which we quoted above, requires the appellant be committed to "the department of mental health, to be confined by the department in an appropriate psychiatric institution." It is clear that it is the department's function to determine the appropriate facility for the appellant. The choice does not lie with the appellant. Thus, the appellant is to be confined in "an appropriate psychiatric institution." Ap-
32 pellant apparently equates the term "psychiatric institution" with the term "insane" and argues that appellant should not be committed to an institution for the insane. The statute is broader in scope than appellant would have us believe. First, an amendment made to § 9–1706a in 1967 is noteworthy. That amendment replaced the phrase "insane hospital" with the present "psychiatric hospital." That amendment also gave the department more flexibility in dealing with various mental problems by substituting the phrase "the court shall order the defendant committed to the department of mental health, to be confined by the department in an appropriate psychiatric institution" for the phrase "the court shall commit the defendant, whether male or female, to the division of maximum security of the Dr. Norman M. Beatty Memorial Hospital." These changes clearly indicate a broadening of the scope of

§ 9–1706a to meet such problems as the one herein presented by the appellant's condition. Further, a careful scrutinization of the statutes creating the Department of Mental Health and setting up the mechanism for its functioning clearly dispel appellant's narrow interpretation.

Burns' Ind. Stat. Ann. § 22–5009 (1969 Cum. Supp.) designates the institutions over which the commissioner of the Department of Mental Health is to have control. That statute reads in pertinent part as follows:

> The commissioner of mental health shall have administrative control of and responsibility for all the state-owned and operated *mental health institutions*, including, but not necessarily limited to, the following designated institutions:
>
> (1) Central State Hospital;
> (2) Fort Wayne State Hospital and Training Center;
> (3) Evansville State Hospital;
> (4) New Castle State Hospital;
> (5) Richmond State Hospital;
> (6) Larue D. Carter Memorial Hospital;
> (7) Logansport State Hospital;
> (8) *Muscatatuck State Hospital and Training Center;*
> (9) Madison State Hospital;
> (10) Dr. Norman M. Beatty Memorial Hospital; and
> (11) Northern Indiana Children's Hospital. [Emphasis added.]

It is clear from the above statute that Muscatatuck State Hospital and Training Center is a "mental health institution" and is within the control of the department of mental health. Burns' § 22–5003(9) defines a "mental health institution" as any state-owned and operated "psychiatric institution" under the control of the department of mental health. Thus, Muscatatuck State Hospital and Training Center is "an appropriate psychiatric institution" within the meaning of the statute (§ 9–1706a), pursuant to which appellant was committed.

From the foregoing it can be seen that the Department of Mental Health, pursuant to § 9–1706a, is to commit appellant to an appropriate institution; that the available scope of institutions, as set out in Burns' § 22–5009, includes the Muscatatuck State Hospital, the very institute to which appellant

aspires; and that the decision concerning the appropriate institution for the appellant is properly to be made by the department. There is nothing to prevent the Department of Mental Health from eventually committing appellant to the institution he now desires. The choice lies within the professional and expert opinion of the department. It is not for appellant to dictate.

Appellant's argument, that the statute in question is unconstitutional because it imprisons appellant possibly for life, must fail. The legislature under its police power may provide for the safety, health, and general welfare. This necessarily includes the confinement, care and treatment of the mentally defective, retarded or insane.

Morgan v. State (1913), 179 Ind. 300, 101 N.E. 6; Marx *v. State* (1957), 236 Ind. 455, 141 N.E.2d 126; *State ex rel. Mavity v. Tyndall* (1946), 224 Ind. 364, 74 N.E.2d 914, cert. denied, 333 U.S. 834, 68 S.Ct. 609, 92 L.Ed. 1118, rehearing denied, 333 U.S. 858, 68 S.Ct. 732, 92 L.Ed. 1138.

Judgment affirmed.

Hunter, C.J., and Givan, J., concur.
Jackson, J., concurs in result.
DeBruler, J., dissents with opinion.

DISSENTING OPINION

DEBRULER, J.: The appellant was charged by affidavit with two robberies, totalling $9.00. Appellant is a twenty-seven year old deaf-mute, blind in one eye, who has never been to any school and has only a rudimentary understanding of sign language. He can neither read nor write.

Two psychiatrists and a teacher from the State School for the Deaf interviewed appellant and testified at the hearing on his competence to stand trial. They all agreed that appellant could not comprehend the nature of the charges against him nor assist in his defense because he had a mental deficiency and also because he had almost no means of communication other than a few gestures and pantomimes. They also agreed that there was almost no chance that appellant ever could improve his understanding sufficiently to be tried, even if he could gain a means of communication. However, the interpreter from the School for the Deaf stated that he knew of no facilities in this State which could help this appellant. He also stated the School for the Deaf did not accept mentally retarded persons. Thus, in effect, the commitment of appellant until he can comprehend the nature of the charges against him and assist in his defense is a commitment for life.

Burns' Ind. Stat. Ann. § 9–1706(a) provides for the commitment to the Department of Mental Health of a criminal defendant who is incompetent to stand trial because he "has not comprehension to understand the proceedings and make his defense." This commitment is for the purpose of giving the psychiatrists a chance to determine what can be done to alleviate the defendant's mental condition so that he can be tried, and a reasonable opportunity to achieve that goal. When the defendant's "sanity" is restored the commitment comes to an end because the purpose of the commitment has been accomplished.

That this is the rationale of the statute can be seen from the statutory language which says:

> If the court shall find that the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and

> to make his defense, *the trial shall not be delayed or continued* on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, *the trial shall be delayed or continued* on the ground of the alleged insanity of the defendant. . . . Upon the return to court of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same *as if no delay or postponement* had occurred by reason of defendant's insanity. Acts 1951, ch. 238, § 2, as last amended by Acts 1967, ch. 291, § 2, Burns' § 9–1706 (a). (Emphasis added.)

The statute clearly contemplates a *delay* in the trial or a *postponement,* which implies that the commitment to the psychiatric institution is a temporary one.

When the defendant's condition is permanent, as in this case and he cannot be helped by any known psychiatric technique, then the defendant cannot be committed under this statute because the *purpose* of the commitment cannot be accomplished.

What then is the purpose of the confinement of this appellant whose condition is permanent. Punitive? Protection of society? Protection of the appellant? Confinement to serve any of these purposes based merely on a trial court finding that appellant "has not comprehension to understand the proceedings and make his defense" in my opinion would violate the due process clause of the 14th Amendment to the United States Constitution. Appellant has not been convicted of any crime, nor found to be dangerous to the community or himself. It has not been shown that he cannot continue to live in our society as he has for twenty-seven years. What conceivable basis is there for committing this appellant to a psychiatric institution for, what is in effect, life?

Clearly, the real basis for this commitment is the existence of the criminal charges against appellant. This is shown by the fact that if those charges were to be dismissed because another person confessed and plead guilty to those crimes, or the complainant admitted he had lied in making the charges, the commitment of appellant under Burns' § 9–1706(a), *supra,* would obviously be ended. Thus, the existence of *unproved criminal charges* operates to keep appellant confined in a state

institution for life. This is a blatant violation of the due process clause of the 14th Amendment to the United States Constitution. For a case interpreting the federal statutes on this point see *U.S. v. Curry* (1969), 410 F.2d 1372.

A permanent or open ended commitment under Burns' § 9–1706(a) would also violate the equal protection clause of the 14th Amendment to the United States Constitution. In order to civilly commit a mentally deficient person the court would have to find that the person, because of a "psychiatric disorder," which includes mental deficiency requires care, treatment, training or detention in the interest of the welfare of such person or the welfare of others of the community in which such persons reside. Burn's § 22–1201(1) and (2). There has never been such a finding in this case and there is no rational basis for treating appellant differently than another person who is to be civilly committed. The existence of criminal charges against appellant is not a rational basis for such a discrimination. *Baxtrom v. Herold* (1966), 388 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620; *U.S. ex. rel. Schuster v. Herold* (1969), 410 F.2d 1071.

The majority opinion, in effect, holds that this technique is within the State's police power to provide for the safety, health and general welfare. I strongly dissent. The majority opinion's summary disposition of this important federal question is not a correct resolution of this issue.

* * * * *

RULING ON PETITION FOR REHEARING (MAY 14, 1970)

Appellant's Petition for rehearing denied.

Jackson and DeBruler, JJ. Dissent.

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5703

THEON JACKSON, PETITIONER

v.

INDIANA

On petition for writ of Certiorari to the Supreme Court of the State of Indiana.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

MARCH 22, 1971.

U S GOVERNMENT PRINTING OFFICE: 1971